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No. 565

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

MONROE AUTO EQUIPMENT COMPANY,
a Michigan corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Monroe Auto Equipment Company, prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the Seventh Circuit, entered on August 3, 1965.

OPINIONS BELOW.

The opinion of the court below is printed as Appendix A hereto; its Decree is printed as Appendix B. The decision and order of the Federal Trade Commission appear at Pages 16 through 61 of the printed Appendix furnished by Petitioner for the use of the court below (here called "App"), of which nine copies are filed herewith.

JURISDICTION.

The final decree of the Court of Appeals for the Seventh Circuit was entered on August 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether a holding that an "economic benefit" resulting from common ownership is a "price discrimination" is unsound and so indefinite as to be unworkable.

2. Whether the use of "indirect purchaser" fiction is warranted when the charge is that a price discrimination resulted from common ownership among purchasers.

3. Whether injury to competition within the meaning of Section 2(a) results from common ownership.

4. Whether a finding that an economic benefit which injured competition could be supported by the record here.

5. Whether the Commissioner's order is so unclear and imprecise as to make compliance impossible.

STATUTE INVOLVED.

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *

STATEMENT.

The Federal Trade Commission's complaint (App. 2) charged Monroe Auto Equipment Company ("Monroe") with violating subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15 U.S.C. §13(a)) by discriminating in price between different purchasers of its automotive products. This complaint was different from each of the many others which preceded it in the automotive industry; and in upholding it, the Seventh Circuit has carried price discrimination concepts far beyond their previous borders.

Monroe is engaged in the manufacture and nation-wide distribution of a line of automotive replacement products, including shock-absorbers, sway bars, load levelers, power steering components and related products; its sales are substantial, exceeding $28,000,000 annually. Monroe sells its products only to warehouse distributors, charging them all the "jobber net" price, and allowing a 20% discount on reported sales to jobbers approved by Monroe. Jobbers in turn purchase from the warehouse distributors, paying the "jobber net" price (App. 66-68).

Warehouse distributors (WD's) resell only to jobbers. Jobbers are engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade servicing the general public (App. 67). Thus, WD's and jobbers do not compete with one another.

The complaint charged, and it was stipulated, that among the warehouse distributors to whom Monroe sells are some "who own, or control," jobber establishments which have been approved by Monroe; and Monroe allows these warehouse distributors the regular 20% discount on sales to jobbers thus affiliated with them (App.

4, 67). It was the theory of the complaint that: (1) Monroe exercised a control over the relationship between the warehouse distributors and the jobbers which made the latter "in all essential respects" purchasers from Monroe; and (2) That Monroe's granting a discount to its direct purchaser, the warehouse distributor, on sales to jobbers under common ownership with it,[1] "results" in a more favorable price to the affiliated jobbers than to jobbers not affiliated with a warehouse distributor (App. 4, 5).

Testimony taken at the hearing developed different degrees of affiliation between warehouse distributors and jobbers. For example, R. T. Clapp Company, a warehouse distributor customer of Monroe's, owns all of the stock of one jobber company, and a controlling interest in another, to both of which it sells Monroe products (App. 90 *et. seq.*). Another warehouse customer, TVK, also owns part or all of the stock of jobber companies. In the case of Harts Automotive, Mr. Hart was President, Chairman of the Board, and controlling stockholder of the warehouse and a majority stockholder in several jobber corporations (App. 76 *et. seq.*)

There was also testimony which showed that each warehouse distributor was managed in its own interests as an independent business; selected lines of merchandise deemed desirable by its management; purchased and stocked merchandise as required by its market area; actively promoted sales on behalf of its suppliers among all reputable, potential jobber customers in its market area; and sold and served all of its customers on the same terms and without favor to jobbers in some way affiliated with it (App. 77; 83; 84; 88; 89; 91; 101).

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[1]Jobbers associated in some form of common ownership with W.D.'s. will be called "affiliated" jobbers here.

Similarly, the affiliated jobbers purchased from warehouse distributors at the same price as unrelated jobbers, and conducted their own separate business of their own purposes. Nothing in their purchasing from the warehouse distributor placed them in a better position than any of their competitors (App. 80; 82; 84; 85; 102; 106).

The Hearing Examiner in his Initial Decision recognized that "Except for relationships between certain jobbers and distributors there would be no unlawful discrimination shown in this record" (App. 13). The Commission found a violation of Section 2(a) by reasoning that: (1) The jobbers are "indirect purchasers" from Monroe; and (2) Monroe's granting a discount to a WD on sales to its affiliated jobbers would "in the light of business realities," result in a "direct benefit" to the jobbers (App. 25). It did not spell out the nature of this "benefit" to the jobbers (App. 25) nor indicate what degree of affiliation would give rise to this supposed benefit.

REASONS FOR GRANTING THE WRIT.

As Commissioner Elman pointed out in a sharp dissenting opinion, the Commission's order "forbids respondent to grant its warehouse distributors any compensation, however slight, on resales to affiliated jobbers"; he added that the conclusion "is supportable under no tenable theory of Robinson-Patman Act liability" (App. 43). The Commission here for the first time adopted *a principle of law* to the effect that an unspecified legal benefit resulting from ownership affiliation is equivalent to a price discrimination within the meaning of the Robinson-Patman Act. The established law is to the contrary: price discrimination under the Act has always been considered, by the bench and bar, as a *price difference* (*Anheuser-Busch* v. *Federal Trade Commission*, 363 U.S. 536, 548 (1960); Rowe, *Price*

Discrimination Under the Robinson-Patman Act (1962) Page 31).

In affirming the Commission, the Seventh Circuit has in effect adopted a *per se* rule prohibiting common ownership or affiliation between warehouse and jobbers. This blanket condemnation of any relationship between them is not only unprecedented, but unrealistic and unsound. In the circumstances, review by this Court is required.

1. The holding that an "economic benefit" resulted from common ownership is not only unprecedented and unsound, but is so vague and indefinite as to be unworkable.

The Commission found that an economic benefit resulted from the WD allowance to a jobber-affiliated buyer; this may properly have been a question of fact. The Commission then took a second step, and concluded *as a matter of law* that this "economic benefit" is a price discrimination within the meaning of the Robinson-Patman Act. The legal question presented was: Assuming for the sake of argument that an economic benefit was confered by common ownership, is this a price discrimination under Section 2(a)?

The Court of Appeals for the Seventh Circuit upheld the Commission's finding of fact, and affirmed on that ground alone, without discussion of the legal questions involved. That Court's basic misunderstanding of the problem is demonstrated by two sentences in its opinion, in which it states a question of law and follows with a non-sequitur as to fact:

> "In this court, Monroe contends that the Commission erred in equating an (assumed) economic benefit arising from common ownership with a price discrimination under section 2(a). We are required to accord conclusive effect to the Commission's findings of facts, if supported by substantial evidence." (Appendix A).

By supporting the Commission's finding of fact while ignoring the legal principle involved, the Court of Appeals has left the law in a state of complete confusion. In the automotive replacement industry, distribution systems based on redistribution allowances have proved to be efficient, and are commonly used.[2] Yet the decision here has made it almost impossible for counsel to advise manufacturers and wholesalers of the circumstances under which such allowances may legally be made.

These allowances are granted to the manufacturer's customer on redistribution made by the customer. And according to the decision here, their legality depends upon the relationship between the customer and a third person—the customer's customer. Would a redistribution allowance be illegal if these two are related as parent and wholly owned subsidiary? Partially owned subsidiary? If one individual owns a controlling share of each? If he owns a minority interest in each? And how is the seller to determine the existence and degree of these relationships among the purchasers of his product—direct and "indirect"?

The Seventh Circuit's blanket condemnation of ownership affiliation would appear to require a manufacturer to investigate the possible existence of some or all of these varying degrees of common ownership as between each of its customers and the customers' customers. That this would be impossible in the case of a nation-wide distributor is emphasized by the facts in this case. The parties stipulated that Monroe's sales exceed $28,000,000 annually, and are made to approximately 300 warhouse distributors who resell to approximately 11,000 jobbers; and that "among Monroe's purchasers" are "certain" warehouse

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[2] As Commissioner Elman pointed out, this system has become standard in the industry (App. 34).

distributors who own or control jobbers (App. 66, 67). The testimony taken at the hearing developed several examples of common-ownership situations. Although no exact figures are available, it is apparent that the amounts involved in sales to these warehouse distributor customers for resale to affiliated jobbers are small in comparison with Monroe's total sales.

The Commission, now affirmed by the Seventh Circuit, began and ended with the proposition that there is a price discrimination if there is "sufficient identification of the WD with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other." (App. 19). Its announced test was that, as between the WD and the affiliated jobber, "*any benefit* conferred upon one would in the light of the business realities shown on the record, result in a direct benefit to the other. • • • these facts *amount to a prima facie showing of price discrimination* among competing customers." (App. 25; emphasis supplied).

This is a unque proposition in antitrust law, and the Commission accordingly was unable to support it by citation of any authority in point.[1] The Commission relied on *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952), which, as Commissioner Elman pointed out (App. 45-47) is inapplicable. *Ruberoid* involved sales directly to various classifications of customers, and the misclassification of those customers by ignoring the functions performed by them, resulting in actual dollars and cents discrimination between Ruberoid's competing customers. This is a different situation entirely.

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[1] The Court of Appeals solved this difficulty by completely ignoring the legal question presented by the appeal.

The Court of Appeals distinguished two of its own opinions which would have dictated a contrary conclusion from that reached by it, on the grounds that they were decided under other sections of the Robinson-Patman Act. While this is true, the distinction is not a decisive one. (And, in our opinion, it is a distinction without a difference.)

Nuarc Company v. *Federal Trade Commission*, 316 F2d 576, 582 (7th Cir., 1963), was concerned with a charge under Section 2(d) of the Act, prohibiting payments for services or facilities furnished by one customer unless similar payments are made available to all other customers. It held that a supplier's payment, for advertising in a publication owned, controlled and managed by the same person who owned, controlled and managed one of the supplier's customers, was not a payment for the benefit of that customer in violation of Section 2(d). The opinion pointed out that:

> "The only benefit that could have possibly accrued to Foster Type was through the indirect route of profits from the printing business accruing to Borowsky—the owner of both enterprises. *This without more, cannot be the basis of a Section 2(d) violation.* A contrary decision would operate as a compulsory divestiture for any owner of an advertising medium that also engaged in a separate enterprise selling products advertised in his publication." (Emphasis supplied.)

Central Retailer-Owned Grocers, Inc. v. *Federal Trade Commission*, 319 F2d 410, 415 (1964), the second of its own decisions which the Seventh Circuit distinguished, held that ownership of a distributor by grocers does not necessarily make unlawful, under Section 2(c) of the Act, brokerage payments made to the distributor on pur-

chases for those grocers. Pointing to the facts which showed that the distributor performed the legitimate brokerage functions, the Court said:

> "Reason does not permit our ignoring these facts in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale price to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large chain stores."

2. The use of the "indirect purchaser" fiction is unwarranted when the charge is that a price discrimination resulted from common ownership among purchasers.

Section 2(a) prohibits discrimination in price between different "purchasers" of commodities. Traditionally, it has been considered that the Act means what it says, and that the "term purchaser means simply one who purchases, a buyer, a vendee" (*Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F2d 331, 333 (3rd Cir., 1939). Certainly the literal text of the Act does not include the seller's customer as a "purchaser" (Rowe, Price Discrimination Under the Robinson-Patman Act, (1962) Pages 58-59).

The Federal Trade Commission, affirmed in a few cases by courts of appeal, has engrafted its own qualification onto the literal text of the Act—as Commissioner Elman puts it, a "gloss on the statute'" (App. 39). This implantation is that the manufacturer's retention of varying degrees of control over the terms of resale, and direct contact by him with his customer's purchaser, will transmute the latter (by legal fiction) into an "indirect purchaser" from the manufacturer. (*American News Co.* v. *Federal Trade Commission*, 300 F2d 104, 107 (2nd Cir. 1962) *cert. den.* 371 U. S. 824 (1962).

The use of this fiction has previously been restricted to two kinds of cases: Those in which its use is necessary

to correct a drastic evil, as the "misuse of the economic power of large buyers" found in *American News;* or, where the manufacturer sells to different customers at different prices, and competing purchasers pay different amounts in dollars and cents, as in *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (7th Cir., 1956), *cert. den.* 355 U.S. 941 (1958).

Neither of these reasons for importing a legal fiction into the decision was present here, and its use was entirely unwarranted. Monroe's system of distribution contains no built-in price differences, and in fact was designed to avoid discrimination.

Monroe sells only to warehouses, and redistribution allowances are paid to them only upon resale to businesses performing a genuine jobber function. Warehouse distributors compete with one another, and not with jobbers, who in turn all pay the same price. The only price difference is between persons at different levels of competition (i.e., those who sell to jobbers and those who sell as jobbers to the retail trade). As Commissioner Elman remarked, "Apparently, few manufacturers use so simple—and, from the Commission's standpoint, one might suppose, so innocent—a system as the present respondent * * *" (App. 36).

Traditionally, legal fictions are used with restraint. Following this pattern, the "indirect purchaser" doctrine has previously been applied by the courts in circumstances in which the buyer or seller took direct discriminatory action, resulting from a choice by him in a particular instance. It has not and should not be used when a one-price seller simply followed his normal (and legal) distribution pattern, and there is no price discrimination except such as may result from private ownership arrangements on the part of the purchaser.

3. Injury to competition within the meaning of Section 2(a) does not result from common ownership alone.

Section 2(a) of the Robinson-Patman Act prohibits price discrimination when "the effect of such discrimination may be to substantially lessen competition," and without proof of that effect the Government's case must fall. In this case, the injury alleged is to unaffiliated jobbers competing with affiliated jobbers. The basic inquiry here, and one of which both the Commission and the Seventh Circuit lost sight, is whether any economic advantage accruing through common ownership is the kind of competitive advantage which the Robinson-Patman Act was intended to forbid. Once again, the Seventh Circuit merely affirmed the Commission on an issue of fact, and ignored the question of law involved.

Section 2(a) is intended to protect *competition* rather than individual competitors. "Anti-trust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." (*Atlas Building Products Co.* v. *Diamond Black & Gravel Co.*, 269 F2d 950, 954 (10th Cir., 1959), cert. den. 363 U.S. 843 (1960).

This injury to competition flowing from price discrimination has always been a matter of a price difference in dollars and cents—and that, indeed, is a difference which can be readily measured and understood; its impact is direct and easily demonstrated. On the other hand, any advantages which may accrue to stockholders or other business investors, ownership of stock or other interests in more than one business, are not and should not be cognizable in law as a price discrimination within the meaning of the Robinson-Patman Act. Such advantages are properly for consideration primarily by economists. These

benefits, if any, are simply not measurable with the precision required by a price discrimination statute. Nor have they to date been outlawed by the Robinson-Patman Act.

4. The Record here does not support the Commission's finding that affiliation resulted in an economic benefit, or that such a benefit could injure competition.

As Commissioner Elman pointed out in his dissenting opinion, the "notion of 'benefit' has no factual content" (App. 41). That opinion summarized:

> "If the record in the present case showed that any of respondent's warehouse distributors in fact was merely a front for a jobber affiliate, or that any distributor was in fact himself selling as a jobber, the Commissions position would derive support from the decisions. *But the record affirmatively shows the contrary*" (App. 48).

5. The Commission's Order is so unclear and imprecise as to make compliance impossible.

The Commission's orders must be, "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application". *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368 (1962).

Commissioner Elman's dissenting opinion spells out the objections to the present order at Pages 36 to 38 of the Appendix.

CONCLUSION.

Commissioner Elman put the matter succinctly: "Nothing in the existing law of Section 2(a) justified what is in effect a per se rule barring a warehouse distributor from selling a jobber with which it is affiliated in the manner shown on this record."

We submit that the Commission and the Seventh Circuit have carried the law in a matter of nation-wide significance to a point not contemplated by Congress, and that the intervention of this Court is required.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14824 September Term, 1964 April Session, 1965

Monroe Auto Equipment Company, a Michigan corporation, Petitioner,
v.
Federal Trade Commission, Respondent.

Petition to Review an Order of the Federal Trade Commission.

June 16. 1965

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and GRUBB, *District Judge*.

Schnackenberg, Circuit Judge. Monroe Auto Equipment Company, a Michigan corporation, petitioner, by its petition asks us to review and set aside an order of the Federal Trade Commission which commanded Monroe to cease and desist from discriminating in the price of automotive products of like grade and quality, in commerce, by selling same to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price, in violation of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13 (a).[1]

By its complaint, the Commission alleges that Monroe sells automotive products in the so-called "after market",

[1] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, • • •

which is classified by Monroe into "warehouse distributors (WDs)" and "jobbers". It sells directly only to WDs who normally resell only to jobbers. The complaint alleges that WDs purchase from Monroe at "Suggested Net Jobber Cost Sheet" prices and that, under the terms of a WD agreement, they receive a 20% allowance on all such sales to jobber reported by them to Monroe. Monroe grants such an allowance to WDs only on sales to jobbers who have signed contracts approved by Monroe and on sales made at prices set forth in Monroe's published "Suggested Net Jobber Cost Sheet".

Monroe sells to about 300 customers classified as WDs, in the United States.

A jobber is normally engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade. Such a jobber signs a "Monroe Auto Equipment Company Jobber Agreement" with a WD, and such agreement is approved and signed by Monroe.[2]

The complaint concludes that the effect of such price discriminations may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition, in violation of § 2 (a) aforesaid.

The charges in the complaint are denied by Monroe in its answer, which also sets up as a defense that if any price differentials exist they are justified by a due allowance for differences in cost or have been made in good faith to meet an equally low price of a competitor. However these defenses were not pressed and are not now live issues.

([1] Continued)
where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *.

[2] There are approximately 11,000 such jobber-purchasers in the United States.

The parties stipulated many of the basic facts and the testimony of Monroe's vice-president Bickel, in charge of merchandising, was received. Subsequently, on his own motion, the examiner reopened the record and the testimony of four witnesses was taken and documentary exhibits were introduced.

Thereafter the record was closed and, the parties having submitted proposed findings, an initial decision, finding the facts, was filed by the examiner, in which he concluded that Monroe had violated the law as alleged and directed issuance of an order to cease and desist.

In addition to the stipulated facts, which are incorporated in his decision, the examiner's findings, as summarized, are as follows: The evidence established a course of dealing by the petitioner, its WDs and its jobbers, which result in an "indirect purchaser" relationship between Monroe and the jobber-purchasers of its products, resulting in direct dealings between Monroe and the jobbers and Monroe's fixing of prices, terms and conditions of sale. He held that, even though certain of the affiliated WDs and jobbers were separate corporate entities, the effect of the relationships between them was that the jobbers received the benefit of WD allowances and that a failure to disregard the corporate entities would permit certain customers of Monroe a price advantage over their competitors which would violate the statute of the corporate device were absent.

The examiner found that Monroe's granting of the 20% WD allowance on "so-called 'sales' " to jobbers owned or controlled by WDs and indirectly to jobbers who owned or controlled WDs, resulted in price discriminations far in excess of the average net profit usually earned by automotive parts jobbers. He then concluded that discriminations of such magnitude necessarily enhanced the competitive opportunities of the favored purchasers and that their effect "may be substantially to lessen competition, or to injure, destroy, or prevent competition" in violation of section 2 (a).

On appeal by Monroe, the Commission heard the matter on briefs and oral argument, and by its decision modified the examiner's decision. While agreeing with the examiner's application of the "indirect purchaser" doctrine to transactions between Monroe and independent jobbers not affiliated with a WD, the Commission rejected this doctrine as to Monroe's dealings with affiliated WD jobber entities and found instead that the latter were direct purchasers from Monroe. Treating, as the "sole remaining question", whether there was sufficient evidence of identification of the WDs with their jobbers to give rise to the conclusion that a discount given to one will enure to the benefit of the others, the Commission examined the testimony, made findings, and concluded that "for all practical purposes" these organizations operate as a single unit so that any benefit conferred on one would, in the light of the business realities shown on this record, result in a direct benefit to the other.

The Commission considered Monroe's rebuttal evidence and concluded that it had "fallen short of the mark".

Having modified and supplemented the initial decision, it was then adopted as the decision of the Commission.

In this court, Monroe contends that the Commission erred in equating an (assumed) economic benefit arising from common ownership with a price discrimination under section 2 (a). We are required to accord conclusive effect to the Commission's findings of facts, if supported by substantial evidence. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 487. There is such substantial evidence in this record[3] that Monroe sold to direct-buying WD-jobber entities for redistribution through affiliated

[3] An illustrative situation is that of Hart's Automotive Parts Company, Inc., of which R. Henry Hart, Jr. was president and controlling stockholder. Hart's was engaged in warehousing and distributing automotive parts to all classes of automotive customers, with its main office located at 1230 Market Street, Chattanooga, Tennessee. At this address, according to the witness, the company functioned as a WD under the name of Auto Parts Warehouse Company, and maintained a sales counter for

jobber outlets at an allowance of 20%, while independent jobbers, in competition with these same outlets in the resale of Monroe products, were required to pay regular jobber prices on their "indirect purchases" from Monroe through WDs.

In this court Monroe relies on *Nuarc Co.* v. *Federal Trade Commission,* 7 Cir., 316 F.2d 582 (1963), where we set aside an order entered by the Commission finding that Nuarc had violated § 2 (d) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13 (d). *Nuarc* is not controlling here for at least two reasons; first, it involved a § 2 (d) proceeding and secondly, the evidence in *Nuarc* did not support the order of the Commission, as we held in that case.

Petitioner contends that the "Government's case must fall" because a "probative analysis" of the facts in the case fails to show a causal relationship between price dis-

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([2] Continued)
servicing the jobber trade. At the same time, it maintained another sales counter in the same building for selling as a jobber to the dealer trade. Within Chattanooga itself, the company operated three unincorporated branches (in addition to the main office), each of which functioned soley as a jobber, obtaining their products from Harts' central office warehouse.

In addition to Harts' Chattanooga operations, Mr. Hart testified that outside that city it maintained four jobber corporations, all named Hart's Automotive Parts Company, *viz.,* at Dalton, Georgia, with a branch at Chatsworth; at Cleveland, Tennessee; at Maryville, Tennessee, with a branch at Madisonville; and at Harriman, Tennessee, with a branch at Rockwood. The Commission found that each of these corporations had likewise been signed by Hart's Chattanooga headquarters to Monroe-approved jobber contracts. Mr. Hart acknowledged that each of them, with one exception, was opened with capital supplied primarily by himself, and that he derived his basic income from the Hart's Automotive operation. In each of these corporations, again with one exception, the witness testified that he was majority stockholder, as well as president and chairman of the board.

criminations and an actual or reasonably probable injury to competition. However, as we said in *E. Edelmann & Co.* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 152, at 154:

> "* * * The test of injury to competition has been formulated in various ways. In the Corn Products case, 324 U.S. at page 738, * * * the Court stated, 'The use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.' Later in the opinion, however, 324 U.S. at page 742, * * * the Court stated, 'As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' ***"

([3] Continued)

He stated that monthly meetings were held in Chattanooga, which were attended by the store managers and their salesmen.

Mr. Hart likewise testified that the general books of all out-of town companies were kept in Chattanooga, and that Hart's employed two full-time bookkeepers and one part-time for this purpose. He explained that while each company wrote its own daily invoices, their monthly billing statements were forwarded to purchasers from Chattanooga. In addition, he stated that while each jobber had a local bank account, only four persons were authorized to sign checks on their behalf, with at least two signatures required; Mr. Hart, Mr. Johnson, vice-president, the head bookkeeper in Chattanooga, and each respective store manager.

The witness also testified that the stockholders' meetings for all the various Harts' corporations were held at the central office in Chattanooga on the same day, and that a consolidated balance sheet covering all operations was prepared.

Mr. Hart additionally pointed out that his salesmen were paid no commission on "sales" by Chattanooga to its affiliated jobber stores.

We hold that, in the case at bar, according to the proper competitive injury criteria, the Commission properly affirmed the examiner's finding that petitioner's discriminatory allowances would be likely to result in the requisite anticompetitive effects proscribed by the Act.

Petitioner seeks to rely on our recent holding in *Central Retailer-Owned Grocers, Inc.* v. *Federal Trade Commission*, 319 F.2d 410 (1963), as to which no petition for certiorari was filed in the United States Supreme Court. However, in *Central*, the Commission in its complaint took the position that the sums Central received and accepted from certain of its suppliers constituted brokerage or allowances in lieu of brokerage, in violation of § 2 (c) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13 (c). It was upon that theory alone that the case was submitted to and decided by us. No such theory has been asserted in the case at bar; our holding in Central is inapposite here.

Lastly, we cannot see any unclearness or imprecision in the Commission's order the terms of which are so unmistakable and unequivocal as to have produced two able briefs in this court by learned counsel for petitioner.

From our examination of the entire record, we hold that the findings and conclusions of the examiner, as modified, supplemented and adopteed by the Commission, are supported by the evidence in the record and the principles of law pertaining thereto. Therefore, the order of the Commission should be and is affirmed, and will be enforced by this court.

Order Affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Monroe Auto Equipment Company, Petitioner, v. Federal Trade Commission, Respondent.	No. 14,824

FINAL DECREE AFFIRMING AND ENFORCING ORDER to CEASE AND DESIST
(Filed Aug 3 1965)

Monroe Auto Equipment Company, a corporation, petitioner herein, having filed in this Court on October 2, 1964, a petition to review and set aside an order to cease and desist issued against it on July 28, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Monroe Auto Equipment Company, a corporation, Docket 8543;" and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on May 3, 1965, and this Court having rendered its decision on June 16, 1965:

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioner herein be, and it hereby is, denied;

It Is Further Ordered, Adjudged and Decreed that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith.

By the Court.

/s/ Elmer J. Schnackenberg
Elmer J. Schnackenberg
United States Circuit Judge

/s/ Latham Castle
Latham Castle
United States Circuit Judge

/s/ K. P. Grubb
Kenneth P. Grubb
United States District Judge

Entered: Aug 3 1965

A True Copy:

Test:

/s/ Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit